UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ	
VS.	1:21-CV-296 CMH/JFA
	ALEXANDRIA, VIRGINIA
	MAY 21, 2021
FAIRFAX COUNTY SCHOOL BOARD, ET AL.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by Julie A. Goodwin.

APPEARANCES

FOR THE PLAINTIFF:

PACIFIC LEGAL FOUNDATION
By: MS. ERIN E. WILCOX
MR. CHRISTOPHER M. KIESER
930 G Street
Sacramento, California 95814
916.419.7111
ewilcox@pacificlegal.org
ckieser@pacificlegal.org

PACIFIC LEGAL FOUNDATION
By: MS. ALISON E. SOMIN
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
202.557.0202
asomin@pacificlegal.org

FOR THE DEFENDANTS:

HUNTON ANDREWS KURTH LLP
By: MR. STUART A. RAPHAEL
MS. SONA REWARI
MR. MICHAEL DINGMAN
2200 Pennsylvania Avenue, NW
Washington, DC 20037
202.955.1500
sraphael@huntonak.com
srewari@huntonak.com

OFFICIAL U.S. COURT REPORTER:

MS. JULIE A. GOODWIN, CSR, RPR
United States District Court
401 Courthouse Square
Eighth Floor
Alexandria, Virginia 22314
512.689.7587

(MAY 21, 2021, 10:12 A.M., OPEN COURT.)

THE COURTROOM DEPUTY: Civil Action 21-CV-296, *Coalition for TJ versus Fairfax County Public School Board, et al.*

If counsel would please note your appearance for the record.

MR. RAPHAEL: Stuart Raphael for the defendants, Your Honor.

MS. WILCOX: Erin --

MR. RAPHAEL: I'm sorry. And with me is Sona Rewari, my partner, and Michael Dingman.

MS. WILCOX: Erin Wilcox for the plaintiffs, Your Honor. And with me is Alison Somin and Christopher Kieser.

THE COURT: All right.

Okay.

MR. RAPHAEL: Your Honor has two motions before you, our motion to dismiss and then the plaintiffs have filed a motion for preliminary injunction. I'm happy to take up the motion to dismiss first if that is okay with you.

THE COURT: Go ahead.

MR. RAPHAEL: The most significant fact in this case is that the policy that the plaintiffs are challenging here as racially discriminatory specifically prohibits discrimination on the basis of race. And this is found at ECF 22-1 at pages 4 and 5.

The December 17th policy provides that the admissions process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance, or targets. In the implementing regulation, which is also in the record at ECF 22-2 at page 4, provides that in accordance with that policy the admissions evaluators are not even -- they don't even know the race, ethnicity, or gender of any of the applicants. There's a number assigned to each file, so it is literally a race-blind policy.

Now, the plaintiff concedes that the policy is facially race neutral - that's paragraph 63 of the complaint - but they contend that it was nonetheless enacted for the purpose of discriminating against Asian-Americans.

Now, we pointed out in our opening brief Justice Scalia's concurrence in the *Schuette* case where he said that, a policy that specifically prohibits discrimination on the basis of race cannot -- cannot be as a matter of law unconstitutional.

The plaintiffs say, well, that was just a concurrence. And they're right as far as that goes.

But even assuming hypothetically that you could envision a set of facts where a governmental body adopts a facially race-neutral policy that prohibits discrimination on the basis of race, surely the facts that you would have to plead to show racial intense to discriminate must be a very

high burden, and the plaintiffs have not come close to pleading anything like that here.

Before getting to the facts, I want to make sure that we're all on the same page as to what the controlling law is. The law allows governmental actors to adopt race-neutral measures aware that -- of what the racial consequences might be, and even with a motivation to help underrepresented minorities.

The most recent Supreme Court case that sets forth that proposition is the *Inclusive Communities* decision. That's the Texas Fair Housing Act case from 2015 where the majority wrote in an opinion by Justice Kennedy, Local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problem of facing inner cities does not doom that endeavor at the outset.

And of course that opinion cited Justice Kennedy's concurrence in the *Parents Involved* decision from 2007, which is widely cited as the leading authority that collects the relevant case law on this. And Justice Kennedy said at pages 788 to 89 of his concurrence that, in the administration of public schools by the state and local authorities, it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body one aspect of which is racial composition. And he goes on to offer

a number of examples of race-neutral measures that could be adopted for the purpose of promoting racial integration.

The Coalition doesn't dispute that this is the governing law. It's been followed in four other circuits that we've cited in our papers. It was recently followed by Judge Trenga in the *Loudoun County* case, the *Boyapati* decision.

The Coalition quibbles about whether Justice Kennedy's concurrence is controlling under the Supreme Court's decision in *Marks* which looks at whether a concurring opinion with the plurality opinion provides the -- the controlling authority.

We think that it is legally controlling, just to -- just so we're clear. We think it is legally controlling because the Supreme Court majority cited it for the same proposition in the *Inclusive Communities* case. But even if you thought it were just *dicta*, the Fourth Circuit held in its 2019 *en banc* decision in the *Manning* case that in this circuit, courts should follow *dicta* in concurring opinions that provide the fifth vote under the *Marks* line of cases.

No -- moreover, not as -- the plaintiffs don't cite any court that suggests that the principles of *Parents Involved* should not apply. So, that brings us to the motion to dismiss, and the question is whether the plaintiffs have pleaded facts sufficient to plausibly allege that the school board enacted this policy for the purpose of harming Asian-Americans.

On a 12(b)(6) motion, as the Court is well aware, you disregard conclusory assertions. That's the teaching of *Iqbal* and *Twombly*. And where, as here, the plaintiff relies on statements of school board members from public meetings, the defendant can attach those statements, which we've done, and those statements control over any kind of spin or puffing about them in the complaint. You look to the statements directly.

We filed with our motion to dismiss the declaration of Cindy Smoot at ECF 22-4. And Exhibit A to that declaration sets out what the complaint alleges was said by the superintendent and five of the 12 school board members, and then what they actually said. And we included the video clips as Exhibit B to that declaration.

The Coalition cites the statements of only five of the 12 board members who voted for the policy. None of the statements reflects any anti-Asian animus or an intent to discriminate against Asian-Americans.

Now, it's important to focus on what the Coalition concedes. They concede -- and this is at page 25 of their 12(b)(6) opposition brief, ECF 25. They concede that adopting a race-neutral program with the hope of increasing enrollment of Black and Hispanic students would not trigger strict scrutiny. Of course, that's fully consistent with *Parents Involved*.

The concession is this: Mere motive to increase

the representation of a particular racial group does not render an action racially discriminatory for purposes of an *Arlington Heights* analysis.

Given that concession, when you look at the statements they attribute to board members and the superintendent, they all fall into the safe harbor of statements that at best show a desire to support an increased enrollment of Black and Hispanic students at Thomas Jefferson High School. None shows an intent to discriminate against Asian-Americans or to harm Asian-Americans.

Now, at this point the dispositive case becomes the Supreme Court's decision in *Personnel Administrator versus Feeney*. That was the case where the Supreme Court upheld a Massachusetts law that created hiring preferences for veterans. Women plaintiffs sued and said, that law discriminates against women because 98 percent of veterans are men.

And the U.S. Supreme Court said, no, no, it -- the policy was not enacted to harm women. It was enacted to help veterans, and it doesn't matter that it's disproportionately beneficial to men. You have to show that it was enacted for the purpose of harming women.

Feeney is cited by each of the four other circuits that have followed *Parents Involved* as the rationale which explains why helping underrepresented minorities doesn't mean you're hurting others who are -- who are there. And so it's

just not enough to plead discrimination against Asian-Americans to say, well, the school board wanted to help underrepresented Black and Hispanic students.

They've also failed to show how any aspect of the new admissions policy could have a discriminatory impact on Asian-American students. *Inclusive Communities*, again, the 2015 Supreme Court case says, a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.

They can't make that showing for any aspect to the policy. For example, how does eliminating the $100 application fee disparately affect Asian-Americans, or increasing the minimum GPA from 3.0 to 3.5, or eliminating the standardized testing requirement, or eliminating the requirement that students obtain two teacher recommendations? None of those things has a disparate impact on Asian-Americans. And this is -- their -- their best cases are -- which is that North Carolina voting rights -- voting suppression case. In each of the measures that was struck down in *McCrory* was shown to have a disproportionate impact on African-American voters.

So, for example, the elimination of the Souls to the Poles early voting day overwhelmingly affected African-American voters, and the legislature knew that. And so the evidence there was overwhelming.

Here, the plaintiffs have done nothing to tie any aspect of this policy to a disparate impact on Asian-Americans, with one possible exception. They plead in paragraph 49 of their complaint that -- that there would be a disparate impact from the top 1.5 percent plan. This is the portion of the policy that says that students who are in the top 1.5 percent of their middle schools will be given admission to TJ.

But the flaw there is that they assume that it's a -- they assumed when they filed the complaint that the 1.5 percent plan operates as a cap or a ceiling on admissions from middle schools and it doesn't. It operates as a floor, so the top 1.5 percent get in.

There's still a hundred seats left that are unallocated, and folks -- students who are at the top of their class but below the top 1.5 percent are still eligible for admission to the school. In any event, they haven't shown how that discriminates against Asian-Americans or singles Asian-Americans out.

They also use the wrong baseline for determining whether there is discrimination against Asian-Americans. They want to use the baseline of how many -- what the percentage of Asian-American students was in last year's class. In the -- in the complaint it sets out in the attached -- in the citations to the documents on which it relies.

Data that shows that the student population in

Fairfax County is 19.5 percent Asian. In 2019, 56 percent of the students who applied for admission to TJ were Asian, and 73 percent were admitted. The plaintiff's theory is, well, if we think that there are going to be fewer than 73 percent in the next year's class, that's a disparate impact.

That is not how disparate impact analysis works. The First Circuit pointed that out in the -- in the *Boston Parents Coalition* case just last month.

If they were right, that that's how it works, then if you adopted a completely random lottery it would -- it would result in a reduction in the percentage of Asian students in the class. That couldn't possibly be an equal protection violation, but it would be under their theory, which it just shows that their theory is wrong.

Now, they also advance this idea that a -- of a zero-sum gain. That if you admit an additional Black or Hispanic student, you're going to admit one less or one fewer Asian-American student. That theory has a couple of assumptions that are just wrong. The first is that there is some different rule for admission for Black and Hispanic students than Asian students. There's no different rule.

What -- their theory would be true if you had a quota system. So, for example, the *Bakke* case involving the Davis Medical School. There were 16 seats set aside for minority applicants, and you could fairly make the argument

there that by guaranteeing a seat for a minority applicant you're taking one away for a white applicant.

But here, there's no set-aside. There's no quota. All students compete on the same -- on the same equal footing, and it's race-blind. The top students get in regardless of race. As I said at the outset, the admissions evaluators don't even know the race of the students. And the class size incidentally was increased from 480 students to 550 students, so zero-sum theory just has no application here.

Last point on this before touching briefly on standing.

The Coalition says, don't decide this on a 12(b)(6) motion. Let it go into discovery. But in the words of the Supreme Court in *Iqbal*, you can't unlock the doors to discovery without pleading facts that plausibly allege that the defendant engaged in intentional discrimination.

And of course, your colleague, Judge Trenga, applied this principle in the *Loudoun County* case in *Boyapati*. He granted the motion to dismiss the challenge to Loudoun County's admissions policy changes just a few months ago, and of course -- and that was even assuming for argument's sake that the Loudoun policy would have a disparate impact on Asian students. He nonetheless found that there was no -- no allegations pleaded of an intent to harm Asian-American students, and again said, a desire to benefit underrepresented

minorities does not equal an intent to discriminate against Asian-Americans.

An even better example may be *Ashcroft versus Iqbal* where the Supreme Court set forth the standards for a 12(b)(6) motion that we now -- you know, we all apply. And you recall in that case the plaintiff claimed that Attorney General Ashcroft and FBI Director Mueller intended to discriminate against him. He was an Arab Muslim from Pakistan, and he said, they intended to discriminate against me in the post-9/11 policies that were adopted that resulted in his being subject to harsh interrogation tactics.

The -- the majority in *Iqbal* said, no, no. The much more plausible explanation for what happened was that because the gentleman came from Pakistan and was connected possibly with the 9/11 hijackers, that explains the policy much more than an intent to discriminate on the basis of race or ethnicity.

That was a much harder case than this one given that there is zero evidence, zero allegations pleaded here of an intent to discriminate on the basis of the students being Asian-American. So, that case clearly stands for the proposition that a 12(b)(6) dismissal is appropriate.

Now, I'll touch briefly on associational standing.

We've argued that the Coalition lacks associational standing principally because the members don't have the ability

to control the decisions of the entity. And we've -- you know, we'll stand on our brief on that. Think the law on that is clear from the Supreme Court's decision in *Hunt* and from Judge Cacheris' decision in *Heap*, but I acknowledge a dismissal for lack of standing would be without prejudice. If you have any doubts about what the right answer is on that, we would ask you to reach the merits and to decide the case and dismiss it with prejudice on a Rule 12(b)(6) motion. And in the event that this case goes up on appeal, if the Court can see its way clear to do it to deciding both issues, I think that would -- that would be helpful to the Fourth Circuit.

Would you like me to yield and hear the -- so you can hear the response to that in the PI motion, or should I address the preliminary --

THE COURT: You can do that. We'll take them --

MR. RAPHAEL: On the PI motion? Yes.

So on the -- on the -- the plaintiff's -- and I have only about maybe three or four minutes on this.

On the plaintiff's motion for a preliminary injunction, they have to satisfy all four of the *Winter* factors. *Blackwelder* is no longer the test in this circuit. I've addressed likelihood of success on the merits. We think you should dismiss the case. That they -- the case is meritless.

With regard to irreparable harm, we don't think

that the Coalition has demonstrated it. Eighth graders who applied to TJ are going to find out in just a few weeks if they're getting in or not. The application process is race-blind. There are no set-asides or reserved seats for anybody, and I don't -- I don't think the plaintiffs can plausibly show, and certainly not for a PI motion, how they're about to be discriminated against on the ground that they are Asian-American.

The balance of hardship clearly weighs against the injunctive relief the plaintiffs are seeking. 3500 students nearly, 3470, from a 130 middle schools have applied for admission to TJ. 85 staff members of Fairfax County Public Schools have been working virtually around the clock since May 3rd processing those applications, including working on weekends. They estimate a total of 3400 personnel hours to do that.

It's -- and the decisions are going to be mailed out in -- in just a few weeks in June. It's simply not possible to revert to the old admission system at this point for the new school year. Two of the standardized tests that the plaintiffs want reinstated, the last day to take them is today and they won't be offered again until after September. School starts August 23rd.

The other test you could order the school board to administer, but they couldn't do it before mid-July. And if

that happened, they wouldn't be able to -- they'd have to redo the admissions process because the old process allowed students with GPAs as low as 3.0 to apply, so you would have to reopen it. They couldn't finish it until mid-September at the earliest, more likely October.

Again, school starts August 23rd. And the cost of that would be nearly $200,000. $72,000 to administer the Quant-Q exam, and then because the admissions evaluators would have to work in the summertime when they're not on their -- an annual contract, a year-long contract, the cost of that will be nearly $120,000. So, that totals $191,409. And whether you consider that is with a bond on that would be if they got an injunction or as the harm to Fairfax County Public Schools, the balance of hardship clearly weighs against the preliminary injunction.

Public interest, likewise, weighs against a preliminary injunction. It's simply not in the public interest to disrupt the expectations of 3500 students and their families who have done everything that they believed was needed to apply to TJ and they're just waiting to hear the news in a couple weeks and they -- who would be forced to find other -- make other plans and arrangements for the upcoming school year.

As the First Circuit just said in the *Boston Parent Coalition* case, the public interest is best served by forbidding defendants to finalize and communicate admissions

decisions, not by entering plaintiff's proposed injunction and throwing the school admissions process into chaos.

Last point on this laches. The plaintiff's delay in bringing this suit and seeking a preliminary injunction is really inexcusable. We didn't -- we've raised this argument in our opposition to their PI motion. After that, we just received the declarations they filed from Mr. Miller and Ms. Nomani. And if you take a look at paragraph 5 of those declarations, they say that they founded the Coalition in August 2020 because they -- they believed, quote, that the new policy, quote, would discriminate against Asian-American applicants. They believed that in August of 2020. The no-testing decision was made on October 6, 2020. The decision to have the 1.5 percent plan was December 17th.

Why -- they -- they had one bite at the apple in the *K.C.* case. Fourteen of the Coalition's members brought suit there on state law grounds, and the district -- the trial Court denied the preliminary injunction motion because it was too late to change things, and it wasn't in the public interest. And Judge Tran said they weren't likely to succeed on the merits.

They waited another five weeks to file suit and then six weeks after that to bring on the PI motion. The delay is inexcusable. And as this Court said in *Perry versus Judd* in an opinion that was affirmed by the Fourth Circuit, laches

applies with particular force in the context of preliminary injunctions against governmental action, like we have here, where litigants try to block imminent steps by the government.

And so for those reasons, we think you should dismiss the complaint with prejudice and obviously deny the preliminary injunction motion.

Thank you, Your Honor.

THE COURT: All right.

MS. WILCOX: Good morning, Your Honor. And may it please the Court. My name is Erin Wilcox, and I represent the plaintiff, the Coalition for TJ.

The Coalition for TJ alleges that defendants intended to discriminate against Asian-American students when they altered the admissions procedure at Thomas Jefferson High School for Science and Technology. These allegations are -- of discriminatory purpose are sufficient to survive the motion to dismiss, and they're sufficient to show likelihood of success on the merits for a preliminary injunction. So this Court, with respect, we request this Court to grant a preliminary injunction and to deny defendant's motion to dismiss.

Your Honor, on the merits, according to defendants, Asian-American students are overrepresented at TJ compared to the rest of the Fairfax County Public Schools. And I would like to be clear that overrepresented is just a nicer way of saying that there are too many Asian-American students at TJ

and defendants would prefer there were fewer. The Coalition contends that defendants have changed the admissions policy at TJ at least in part so that incoming -- the incoming TJ freshmen class will have fewer Asian-American students in it.

Overrepresentation is not an acceptable reason for racial discrimination in K through 12 admissions. To succeed an *Arlington Heights* claim, as the Coalition has alleged, the Coalition must prove that the TJ admissions changes were due at least in part to a racially discriminatory purpose. These changes, Your Honor, were made in part because of their adverse impacts on Asian-American students and not just in spite of those adverse impacts. This is discriminatory intent, and that is a violation of the equal protection clause.

Coalition has alleged numerous inference or numerous evidence that would support an inference that the TJ admissions process is motivated at least in part by a racially discriminatory purpose. These inferences are everywhere starting with an e-mail from the TJ principal, Ann Bonitatibus, urging TJ parents last June to consider the racial makeup of TJ, and that it was not representative of its community, and then going on to provide examples of what TJ's racial makeup ought to be in order to be more representative of its community. That process ended with the passage of a racially discriminatory process for TJ admissions in December.

The intent to discriminate against Asian-Americans

and the expected disparate impact shows up in the first draft of their revised TJ admissions process that was presented last September by Superintendent Brabrand. That racial consideration was so significant in that draft that the school -- or that Superintendent Brabrand not only applied the process to the class of 2025 and showed what its racial impacts would be through a pie chart, but he went back and applied that to the classes of 2015 and 2019 as well. Those were outcomes that they knew initially and were able to predict.

In all three cases, Asian-American enrollment and only Asian-American enrollment decreased. Discriminatory impact was not only expected, it was intended. When there are a finite numbers of seats at TJ, you cannot intend to increase seats for one race without expecting and knowing that that will result in the decrease of another race.

Your Honor, while the defendant ceased modeling the racial impact of its changes and later drafts, a Coalition for TJ parent took on that work and crunched the numbers himself, arriving at a 40 pursuit -- two percent decrease in Asian-American students in the incoming class of 25 -- or 2025. That would be this year's current 8th graders.

Race was mentioned more than just in passing. It was more than just one consideration. It is the anchor of this new admissions plan. This plan was chosen because of its impact on Asian-American enrollment and not in spite of it.

The historical backgrounds and other *Arlington Heights* factors supports this. Coming back from a working session in the summer, TJ's principal and a board member were charged with increasing diversity at Governor's Schools. That was the topic of the work session.

The Virginia Secretary of Education charged all Governor's Schools with presenting a plan to increase their diversity last year. So against this backdrop, TJ went much further -- the defendants went much further than just a simple form on how to increase diversity at TJ. They revamped the entire process.

Throughout multiple meetings with the community through the fall and with multiple school board meetings and work sessions, balancing TJ was discussed. Racial proportionality was discussed and at the tip of everyone's mind.

And, Your Honor, irregularities in that process are also a factor that supports an inference of racial intent. The TJ admissions test, the objective measure of merit that had been in place for several years and that students were expecting to take in Oct -- or in November of last year, was eliminated at a school board work session one month before the test was set to be administered. As defendants point out, this is not illegal under Virginia policy, but it's certainly irregular and certainly a datapoint to support something

unusual.

Your Honor, the 1.5 percent plan was ultimately adopted with apparently little warning given to school board members. One commented that she hadn't seen that plan until 4:30 that afternoon. These are unusual and irregular procedures for a massive change that affected so many students and so much of the community surrounding TJ.

And finally, Your Honor, we do have the statements and comments surrounding these change at TJ that went on throughout the fall and into the winter of last year. Your Honor has been provided with those comments and they stand on their own, but there's little doubt that when you read the context, to understand the context of those statements, that race was in the forefront of the decision maker's mind as they were revamping the TJ process.

And, Your Honor, I will touch briefly on their preliminary injunction as well, if that's all right.

THE COURT: Go ahead.

MS. WILCOX: Sure.

So, Your Honor, to truly return the Coalition to its last uncontested status with defendants would require the Court to reinstate the TJ admissions process prior to last October. We understand that that is a difficult and a complicated request. We are asking you to do it anyways because of the rights that are at stake here.

Right now there are 8th graders whose applications to TJ are pending under a process that discriminates based on the race -- color of your skin. But, Your Honor, I would also like to point out, in our briefing we've provided some other options for the Court to consider. Notably, if the Court finds that returning to the prior admissions process for this round of 8th grade applicants is not possible, then eliminating the 1.5 percent plan would still relieve some of the injustice that is being visited upon those Asian-American applicants.

But, Your Honor, we've also requested that -- or want to draw the Court's attention really to the fact that the current year 7th graders will be 8th graders starting in August and will be applying to TJ this fall, so in about six months they will be submitting their TJ applications. And there is time, we believe, before those students engage in the TJ admissions process to return to the last uncontested admissions process in time for the defendants to put that in place, which would happen during a school year and not during the summer. And of course, that would apply to future rounds of students as long as this litigation is pending.

And with that, Your Honor, thank you.

THE COURT: All right. What do you say about the standing issue?

MS. WILCOX: Your Honor, on the standing issue, the Coalition for TJ is a traditional membership organization. We

don't believe you even need to look to the -- whether it has the traditional -- or features of a membership organization because it is a membership organization.

As we've alleged in our complaint and buttressed by the declarations of Ms. Nomani and Mr. Miller, the Coalition for TJ has members. It has three tiers of members. It has a leadership structure. Members communicate regularly through a telegram chat app. They hold events and have all of the basic traditional functions of a membership organization.

When members have disagreed with the mission of the organization in the past, they're free to leave. So we believe that there is no question that the Coalition for TJ is a traditional membership organization. It has demonstrated associational standing.

THE COURT: All right.

MS. WILCOX: Thank you.

MR. RAPHAEL: It's not enough to say we've alleged intentional discrimination. You have to plead facts that plausibly show intentional discrimination against Asian-Americans, and I don't think the plaintiffs have really responded to that problem. They -- they have conceded that an effort to help underrepresented Black and Hispanic students does not equal intentional discrimination against Asian-Americans. And when Your Honor -- if you haven't had a chance to look at it, if you look at the -- Exhibit A to

Ms. Smoot's declaration at ECF 22-4, it sets out what the complaint says and then what the actual statements are, and the actual statements control over what the complaint says.

Here's a good example. Paragraph 45 accuses Board Member Meren of, quote, going a step further and describing the majority Asian-American TJ culture as toxic for Black students.

What Meren actually said is, We've heard from a student who I have spoken with many times now who tried to bleach her skin because she didn't feel welcome as a Black student in the school. It's toxic for those students who feel left out.

So, the characterizations of these statements are incorrect, and not one of these statement shows discrimination against Asian-Americans or an intent to harm Asian-Americans.

I heard no response by Ms. Wilcox to the -- to the overarching the -- the elephant in the room here, which is that the policy not only prohibits the use of race; the admissions evaluators don't know who -- don't know the race of the applicants. The plaintiff has provided no explanation for how that could possibly result in something that is racially discriminatory, and they haven't explained how even the 1.5 percent plan could have a disparate impact on -- on Asian students.

There is a statement Ms. Wilcox made about referencing their -- their allegation, and they've got a

declaration from a parent whose last name is Verma that predicts a 42 percent reduction in Asian-Americans. The plaintiffs have no response to what we said about the problems with that in our papers, which are Verma assumed that the 1.5 percent plan would operate as a cap. It doesn't. It's a floor. And also provides no work product, that no -- doesn't show his work. We have no idea how they came up with that projection.

There has -- you heard nothing from Ms. Wilcox to explain how any aspect of this policy could have a disparate impact on Asian-Americans.

With regard to the claim of a procedural irregularity, they say, well, the no-testing decision was adopted at a school board work session, not a regular meeting. They can see that that wasn't illegal, but they say it was rushed.

You heard no response to what we said about that, which is there's a good reason for why the board acted on October 6th. The tests were to be taken in November, and it takes time to order them, and students have to preregister for them. So that's a much more plausible explanation for the timing than some desire to discriminate against Asian-Americans. It's not like another case that they -- was their lead case in their briefing but you didn't hear mentioned here, the *McCrory* case. That's the North Carolina voting

suppression case where what was procedurally irregular there was the day after Shelby County came down from the Supreme Court that eliminated the pre-clearance requirement, the legislature rushed to pass a voter suppression bill and -- and that was a procedural irregularity that actually bore upon discriminatory effect or an intent. You have nothing like that in this case.

There -- there is just no -- no allegation anywhere in the complaint that shows an intent to harm Asian-Americans or to prejudice against Asian-Americans.

And then last point on standing, you heard no response to the problem that we've made, that we've pointed out is the main problem, and that is the members don't have control over the decisions of the entity. And that's a fundamental requirement under *Hunt*, and he -- but we would ask you to decide both issues and to dismiss the case with prejudice.

Thank you.

THE COURT: Well, they have allegations here that there are a limited number of positions at TJ, so that this desire to -- for diversity or for racial mixing goes at the majority of the students who are there now, or the biggest group of students who are there now, and that this has been intentionally done. And while you -- you say that the policy itself states that it's going to be race-neutral, everybody knows that the policy is not race-neutral, and it's designed to

affect the racial composition of the school.

MR. RAPHAEL: So assuming all of that is true, under *Parents Involved*, it is -- does not trigger strict scrutiny. That's the holding of *Parents* -- of the concurrence in *Parents Involved* and the four other circuits. Race consciousness does not trigger strict scrutiny. What triggers strict scrutiny is if you treat a particular individual differently because of their race on purpose, and that's not happening here. And then it's also not a limited number of --

THE COURT: Well, if -- if this policy -- it seems to me that they're alleging that this school board has come up with a policy that is directly aimed at reducing the number of Asian students at TJ. And that can be done in a variety of ways without just simply coming out and limiting the race of the people that are there.

I don't know the numbers in these schools or -- but I'm sure that you can change the numbers as to the -- how they affect each school and each geographical area, and you could probably come up with whatever you intended to do. And they have some statements here that seem to indicate that that's what it's about. We want more diversity, so that means we want less Asians here.

MR. RAPHAEL: Well, but -- so we want more diversity, that statement is fine. Right? That that -- they concede that at page 25 of their opposition brief. Under *Parents Involved*,

wanting more diversity is --

THE COURT: Well, it's not the statement that bothers me. It's what they're doing and how it affects the Asian composition of the school.

MR. RAPHAEL: Yeah. Well, so --

THE COURT: I mean, you can say all sorts of good things while you're doing others.

MR. RAPHAEL: Well, but, again, why wouldn't that argument have applied in *Feeney* where the veterans preferences reduced -- you know, benefitted 92 percent of veterans were men, but they weren't -- it wasn't adopted to harm women.

You have to show an intent to harm Asian-Americans. Wanting to help underrepresented minorities isn't enough, and that's the holding of all the cases we've cited: *Parents Involved*, the First Circuit, Third Circuit, Fifth Circuit, Sixth Circuit, all of those cases say that. It's -- and if you -- it's fine to try to plead intentional discrimination against Asian-Americans, but you have to allege facts that plausibly show that. And when you look at the statements that they've cited in table -- in Exhibit A -- just please take a look at that because the facts -- none of the statements actually suggest an intent to harm Asian-Americans.

Last point on this. Suppose when law schools didn't admit women and they were ordered to admit women under the Equal Protection Clause, could a -- a male or a minority

male have said, this is hurting my chances of getting in now because you're letting women in? Of course not. The intent is not to discriminate against people who are there who are in the majority. It's the -- at best an intent to help underrepresented students. That does not trigger strict scrutiny.

And that's where I think we really part company with the plaintiffs. I mean, they -- they've conceded the legal point. They've conceded that Justice Kennedy's concurrence in *Parents Involved* is right. So in order -- so nothing that says we want to help underrepresented Black and Hispanic students, that is not enough to trigger strict scrutiny. You have to show an intent to harm Asian-Americans. And if they haven't pleaded that, they can't get in the door on it. And that's really the critical, legal distinction here, Your Honor.

THE COURT: All right.

Do you want to respond?

MS. WILCOX: I would love to. Thank you, Your Honor. Just a couple of things.

First, I do want to make clear, though, we are not conceding that *Parents Involved* that Justice Kennedy's concurrence is controlling. The only controlling part of that opinion is on narrow tailoring, and so we would not concede that the compelling interest section of his concurrence is

controlling on this Court or any other.

Your Honor, also, I would like to point out that *McCrory* tells us that animus is not required for a finding of discriminatory intent, only that the school board acted intentionally to discriminate against Asian-Americans, but there's no requirement that the school board had racist or any kind of animus towards or was feeling racist or had any kind of animus towards Asian-Americans.

Your Honor, regarding Mr. Verma, Himanshu Verma's declaration and his findings, it's -- it doesn't matter whether the 1.5 percent plan is a floor or a ceiling or a cap. What matters is that it is a policy put in place that acts as a proxy, a geographic proxy, essentially, for race, and it is really targeting with excellent precision Asian-American students who attend certain middle schools. Those middle schools are getting drastically reduced numbers of seats at TJ. And anyone who's left over from those middle schools who doesn't fit into that 1.5 percent, which I should also point out is not a pure ranking as best we can tell. It's not just based on who has the highest GPA in those middle schools because there are other holistic factors that the decision makers will be considering. But whoever is left over after that 1.5 percent, goes into this unallocated pool of seats that competes against private school students, that competes against home school students and everybody else who's left. So it's

really these students who are Asian and attend high performing middle schools, these advanced academic center middle schools are really doubly being targeted because of their -- their race and abilities.

Your Honor, regarding the standing, touching on that with the Coalition for TJ, there's no hard and fast requirement that, for example, to be a membership association you have to hold a vote, or there could be associations with very strict rules and policies where members have very little to no control over their leadership or the leadership's decisions.

The Coalition for TJ tends to, as Ms. Nomani and Mr. Miller testified, tends to operate by consensus. That's how they work. But they still maintain a membership structure. The members still converse and debate and engage with all levels of leadership and membership on their decisions. And I think there is simply no evidence that their leadership -- or the members have no control over their leadership.

And, Your Honor, last point that I would like to make. As far as canceling the admissions test one month before it occurred, if only one month was all it took to prepare this entire test and get that ready to go, then I think that might lean towards considering how difficult it would be to re-implement that test in future for future years of students.

All right. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. RAPHAEL: May I make one response?

THE COURT: You may use 30 seconds.

MR. RAPHAEL: Yes, Your Honor.

On *McCrory*, *McCrory* does not stand for the proposition that Ms. Wilcox says. She says, you don't have to show animus. That's not exactly right. What *McCrory* said is, we're not saying the legislature necessarily had racial hatred against Black people. The legislature defended the decision by saying, they -- they -- they adopted these suppression moves because they wanted to discriminate against Democrats, and most Black voters vote Democrat.

The Court said, that's -- that's still discrimination on the basis of race. That's intentional discrimination, and that's absent in this case. No factual allegations to show it.

Thank you, Your Honor.

THE COURT: All right.

Well, I am -- as far as the standing issue is concerned, I'm satisfied that this is a voluntary association with members that set out to accomplish or be involved in some common purpose and that they do have every right to bring this lawsuit.

As to the motion to dismiss, I find that the -- the plaintiff has stated a claim that can go forward. Some of your

arguments are well taken as far as the defendants here are concerned, but I believe the plaintiff has made sufficient allegations to go forward and to sort out the facts of the case. So the motion to dismiss will be denied.

And as to injunctive relief, obviously there is -- some harm is going to come to the plaintiffs here as far as the applications and who may or may not get into school. There is also some irreparable harm that's going to come to the defendants if I start enjoining a process that seems to be completed and can't really be reworked.

I listened and thought about your alternative remedies of reducing the one percent and 1.5 percent requirement or getting rid of that, and I couldn't enjoin that. I'm not sure what that would call for. Sometimes there are a lot of unintended consequences of things that you do or try to do and try not to do.

And again, to try to do it for the incoming students for the following year, it would be the same kind of thing, it seems to me, and probably not necessary. I mean, this pandemic has slowed us down a little bit, but we can move cases pretty quickly here and get them to trial and get them resolved.

So, for those reasons -- and I'll just mention the public interest. I believe in this case that the -- that the public -- Fairfax public and Fairfax County has an interest in

seeing that their schools operate in an orderly fashion and not be interrupted. So I think that the balance of hardship here or harm, the entry of an injunction would harm the defendants more than they -- they would the plaintiffs. So I'm going to deny the request for a preliminary injunction. And if you-all get about working this case, well, we can move it along pretty quickly I believe you'll find.

MR. RAPHAEL: The only remaining item, Your Honor, was we also moved to dismiss the division superintendent in his official capacity as duplicative. I don't think that's disputed.

THE COURT: He will be dismissed in that capacity.

MR. RAPHAEL: Thank you, Your Honor.

THE COURT: All right. Thank you-all.

All right. We'll adjourn until Monday morning at 10:00 o'clock.

THE LAW CLERK: All rise.

(PROCEEDINGS CONCLUDED AT 11:01 A.M.)

-oOo-

UNITED STATES DISTRICT COURT)
EASTERN DISTRICT OF VIRGINIA)

I, JULIE A. GOODWIN, Official Court Reporter for the United States District Court, Eastern District of Virginia, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above matter, to the best of my ability.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Certified to by me this 20TH day of JUNE, 2021.

/s/
JULIE A. GOODWIN, RPR
Official U.S. Court Reporter
401 Courthouse Square
Eighth Floor
Alexandria, Virginia 22314